EOR ARGUMENT

No. 88-1434

In the Supreme Court of the United States

OCTOBER TERM, 1989

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.,
PETITIONERS

v.

UNITED STEELWORKERS OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. 3501 *et seq.*, requires the Office of Management and Budget (OMB) to review agency "information collection requests" to determine "whether the collection of information is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3504(c) and 3508). The central question in this case is whether certain provisions of the Department of Labor's hazard communication standard contain such requests and therefore require OMB review. As our opening brief demonstrates, the PRA's definition of the term "information collection request" provides a straightforward and sensible answer to this question. The United Steelworkers of America, Public Citizen, and Building and Construction Trades Department, AFL-CIO, nevertheless propose an alternative analysis that relies on the "instinct" (Br. 13, 24) of the

statute.[1] This unusual analysis produces confusing and irrational results.

1. We begin by reminding the Court of the procedural posture of this dispute. The court of appeals concluded that the Secretary of Labor's submission of the hazard communication standard to OMB for PRA review violated the court's previous orders because OMB lacked authority to review the pertinent provisions. The court acknowledged that OMB is required to review "information collection requests" (Pet. App. 1a-13a), but it concluded that the provisions at issue "are insulated from OMB authority" because they do not "require the 'collection of information' " and they "embod[y] substantive policy decision making entrusted to [the Secretary of Labor]" (*id.* at 8a). Thus, the court of appeals' determination that the Secretary had violated the court's previous orders necessarily depended on its conclusion that OMB lacked authority to review the hazard communication standard. If the pertinent provisions contain "information collection requests" that are subject to OMB review, the court had no conceivable basis for entertaining this contempt action.[2]

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[1] We shall refer to those three parties, which have filed a joint brief urging affirmance of the court of appeals' decision, as the "respondents." The other parties responding to the government's petition—the Associated Builders and Contractors, Inc. and the Construction Industry Trade Associations—have filed a brief urging reversal of the court of appeals' decision.

[2] Respondents suggest (Br. 48 n.35) that, whether or not OMB has authority to review the hazard communication standard, the Secretary's submission of the standard to OMB violated the court of appeals' "clear command." This suggestion is without foundation. The court of appeals' previous order had stated, under threat of contempt sanctions, that the Secretary shall

> within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers covered by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible.

United Steelworkers of America v. *Pendergrass* (*USWA II*), 819 F.2d 1263, 1270 (3d Cir. 1987) (footnote omitted). The court of appeals' order, which prohibited the Secretary from gathering additional record evidence, is inconsistent with this Court's decisions in *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 142-143 (1940), and *Fly* v. *Heitmeyer*, 309 U.S. 146, 148 (1940). See also *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-545 (1978). The Secretary nevertheless fully complied with the court's order by issuing an expanded version of the hazard communication standard in the form of a final rule. See 52 Fed. Reg. 31,852 (1987). The Secretary's subsequent submission of the standard to OMB for PRA review did not violate any "clear command" of that order.

2. We believe that the PRA definitively answers the question whether the hazard communication standard contains "information collection requests." The statute specifically defines the term "information collection request" to include a "reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information" (44 U.S.C. 3502(11) (1982 & Supp. V 1987)). As we explained in our opening brief, the hazard communication provisions at issue here, which require employers to gather, store, and disseminate documents and other information, impose, at a minimum, both reporting and recordkeeping requirements and therefore fall within that definition. See Gov't Br. 18-25. Thus, application of the statute's express definitions resolves the matter.

While our submission is straightforward, respondents' reply is quite complex. Respondents argue (Br. 19) that there is an inherent distinction between information collection requests that are the "means" to a regulatory end and information collection requests that are themselves a "substantive end." Based on this general principle,

respondents then argue that the PRA is "instinct with the understanding that the sole subject covered by the [statute] is Federal agency directives to private parties to provide information to the agency for the agency's use" (*id.* at 13, 24 (emphasis omitted)). In actual application, however, respondents' reliance on this supposed "instinct" quickly breaks down.

For example, respondents concede that if an agency demands that persons gather information and send it to the agency, and the agency then disseminates this information to the public (presumably to achieve some "substantive end"), the agency has made an information collection request and the PRA applies. See Resp. Br. 30-33. But respondents contend that if, as here, the agency demands that the person gather information *and* disseminate it to the public *himself*—thereby imposing greater paperwork obligations on that person—the agency has not made an information collection request and OMB has no authority to review the agency's action. See, *e.g.*, *id.* at 13, 24, 27, 30. It thus appears respondents' position turns not so much on the means/ends distinction, but rather on a formalism: whether the information is physically transmitted to the government.

Respondents fail to explain why Congress would have drawn this peculiar line or why, if Congress had intended such an odd distinction, it did not make its intention explicit. We submit that this Court should rely on the PRA's language, rather than its "instinct." That language indicates that Congress contemplated no such distinction. Respondents' position produces confusing, counter-intuitive, and irrational results precisely because it has no moorings in the statutory text.

a. Respondents begin by declaring, under principles reminiscent of natural law, that "the logic of the process by which the Government elaborates the law generates a basic distinction between two classes of Government actions requiring private parties to prepare and disseminate

information" (Br. 18-19). The first class, respondents tell us, consists of information requirements that are "means to a further end," while the second class comprises information requirements that are "the substantive end of the regulatory process in and of itself" (*id.* at 19 (emphasis omitted)). This grand dichotomy, however, is soon discarded. Respondents concede that agency information collection requests include both categories, and they acknowledge that there is actually a continuum of cases, which includes "the polar extremes in which the distinction is clear and borderline cases in which the distinction blurs" (*id.* at 19 n.12).[3]

Respondents' "logical" premise and implementing classifications have doubtful utility as theoretical constructs; they appear to be little more than a post hoc justification for the court of appeals' ruling.[4] In any event, they certainly are not a substitute for the statutory text. As the court of appeals recognized, the "sole question" here is whether the regulatory provisions at issue "involve either the 'collection of information' or an 'information collection request' within the meaning of the [PRA]" (Pet. App. 9a). Those terms, which Congress has defined to include "reporting or recordkeeping requirements" (44 U.S.C. 3502(4) and 3502(11) (1982 & Supp. V 1987)), aptly describe the Labor Department's hazard communication standard. They *do not* distinguish between information

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[3] For example, respondents concede that SEC-required information disclosures submitted to an agency "for the purpose of making it available to the public" (Br. 32) are covered by the PRA. In terms of respondent's proposed dichotomy, however, these disclosures serve a "substantive end of the regulatory process."

[4] Indeed, respondents' classifications, which group the Department of Labor's hazard disclosure requirements with automobile turn signals (Resp. Br. 19) but separate from the SEC's financial disclosure requirements (*id.* at 30-33), are not self-evident and produce far more confusion than clarity.

collection requests that are a "means to a further end" and "the substantive end of the regulatory process in and of itself" (Resp. Br. 19). Respondents' creation of a vague, artificial classification scheme (which respondents concede is really a continuum of distinguishable cases) is simply an attempt to engraft exceptions to the PRA's definitions that are not present on the face of the statute.

Respondents give scant attention to the "definitions upon which petitioners place such reliance" (Br. 27). They acknowledge that "the PRA goes quite far in empowering OMB to review * * * directives to private parties to make information available to the Government for the Government's use" (Br. 20), but they contend that "there is not a single indication that the PRA goes the next step and empowers OMB to review * * * substantive directives to private parties to make information available to other private parties for the latter's own use" (*id.* at 20-21). Congress, however, quite clearly manifested its intention that the PRA would cover both situations by declining to distinguish between them. In particular, Congress did not draw respondents' distinction in defining a "collection of information" and an "information collection request." The absence of a textual differentiation is powerful evidence that no such distinction was intended. Respondents have no answer to the PRA's definitions. Indeed, their entire discussion of the PRA's definition of "information collection request" is contained in a single sentence stating that the definition "sheds no further light on the subject" (Br. 30).[5]

[5] Respondents acknowledge (Br. 28) that the PRA's definition of "collection of information" (44 U.S.C. 3502(4)) includes "the obtaining or soliciting of facts or opinions by an agency through the use of * * * reporting or recordkeeping requirements" (44 U.S.C. 3502(4)). Respondents urge, however, that the definition contemplates only situations where the agency either "obtains or 'endeavors to obtain' facts or opinions" (Br. 28).

Respondents' argument suffers from an obvious flaw: an agency does not itself "obtain" facts or opinions through the imposition of recordkeeping requirements. Congress plainly used the word 'solicit" to include situations where an agency requires a person to collect information for the benefit of someone else. Indeed, that word is commonly used to describe agents who seek to obtain an object for another. See *Webster's Third New International Dictionary* 2169 (1976) (citing, as an example of a solicitor, an agent who solicits contributions for charitable causes).

As we note in the text, respondents summarily reject the relevance of the PRA's definition of the key term "information collection request." They contend that "an 'information collection request' is simply a particular requirement 'calling for the collection of information' " and therefore "sheds no further light on the subject" (Br. 30). Respondents have no answer to the fact that Congress has defined an "information collection request" in terms—such as reporting and recordkeeping requirements—that clearly describe the hazard communication standard.

Respondents' reliance on the statute's "instinct" (Br. 13, 24) is an ornate admission that they can identify no provision of the PRA that expressly adopts their theory. It is also a tacit acknowledgement that the Court can reach the result that they seek only through implication. But respondents offer very little in support of that implication. The evidence they cite indicates, at most, that Congress was aware that demands for information submitted to an agency can impose substantial burdens. It certainly does not indicate that this was Congress's *sole* concern.

Respondents place primary reliance on the PRA's general statement of purposes. They point out (Br. 24-25) that the PRA states that one of its purposes is "to minimize the Federal paperwork burden" (44 U.S.C. 3501(1)), and that the statute later defines the word "burden" to mean "the time, effort, or financial resources expended by persons to provide information to a Federal agency" (44 U.S.C. 3502(3)). Respondents contend that those provisions demonstrate that the PRA is concerned only with

agency requirements "to provide information to the agency for the agency's use" (Br. 24 (emphasis omitted)). That reasoning, however, is unconvincing.

As an initial matter, the federal government can and does "use" information in a variety of ways besides collecting and analyzing it. Information is also being "used" for governmental purposes when an agency requires persons to collect information and then disseminate it to the public. By the same token, although the PRA defines the term "burden" in terms of "provid[ing] information to a Federal agency" (44 U.S.C. 3502(3)), we do not believe that the definition, or the reach of the statute generally, hinges on the physical *transmission* of the information to the federal government. As the D.C. Circuit explained in a case involving the PRA's predecessor, the Federal Reports Act of 1942, 44 U.S.C. 3501 *et seq.* (1976):

> Appellants cannot seriously believe that in enacting the Reports Act Congress was concerned solely or primarily with private parties' costs of *mailing* data to Washington; it is the record-keeping and data-gathering that constitute the burden. Moreover, OMB and its predecessor, the Bureau of the Budget, have interpreted the statutory term "collection of information" for nearly half a century to encompass "[a]ny general or specific requirement for the *establishment or maintenance* of records . . . which are to be used *or be available for use* in the collection of information." * * * Even under the deference we owe the agency, * * * we doubt we could uphold a view of the Reports Act that made physical delivery to an agency essential to the notion of "collection of information." Happily we confront no such oddity.

Action Alliance of Senior Citizens v. *Bowen*, 846 F.2d 1449, 1453-1454 (1988), petition for cert. pending, No. 88-849; see also Pet. App. 9a (acknowledging the *Action Alliance* decision); 5 C.F.R. 1320.7(b).

Respondents' reliance on the PRA's statement of purposes suffers from a deeper flaw. A general statement of purposes is just that—a declaration of motivating factors. Such statements do not override the Act's express, operative provisions. In this instance, the PRA's relevant operative provision states that OMB shall examine "information collection request[s]" to "determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility" (44 U.S.C. 3508). The only question here is whether the hazard communication standard contains such requests. We have shown that it does, and it is therefore subject to OMB's review.[6]

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[6] Respondents also argue that the PRA's definition of the term "practical utility" supports their position. The PRA defines that term to mean "the ability of the agency to use information it collects" (44 U.S.C. 3502(16) (Supp. V 1987)). As we indicate in the text, an agency can put information "to use" (by requiring, for example, its dissemination) without actually receiving it. But in any event, practical utility is only *one* factor that OMB considers in determining whether the collection of information "is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508). See generally 5 C.F.R. 1320.4(b), 1320.7(o). (In this brief, as in our opening brief, we cite OMB's regulations as they will appear in the 1989 Code of Federal Regulations. See 53 Fed. Reg. 16,618, 16,623 (1988); Gov't Br. Add. 9a-15a.)

Respondents' remaining inferential support is particularly unpersuasive. Respondents rely (Br. 21-22) on selected PRA passages that require agencies to eliminate "information collections which seek to obtain information available from another source within the Federal Government" (44 U.S.C. 3507(a)(1)(A)), and to reduce "the burden on persons who will provide information to the agency" (44 U.S.C. 3507(a)(1)(B)). They also note (Br. 25) that in the absence of an OMB control number, "no person shall be subject to any penalty for failing to maintain or provide information to any agency" (44 U.S.C. 3512). These provisions simply recognize the undisputed fact that agencies frequently require private parties to collect information and

Not only is the inferential support for respondents' proposed implied limitation on the scope of the PRA weak. Perhaps more importantly, their contention cannot be squared with the express terms of the relevant definitions at issue here. Respondents are unable to provide a reasonable explanation why, if "information collection request[s]" are implicitly limited to directives "to provide information to the agency for the agency's use" (Br. 13, 24 (emphasis omitted)), the statutory definition of "information collection request" explicitly *includes* "recordkeeping requirement[s]" (44 U.S.C. 3502(11) (1982 & Supp. V 1987)). Respondents' only answer is that Congress must have intended to limit the term "recordkeeping requirement" to records containing information "prepared for the Government's use" that must be provided to the government "upon request" (Br. 29 (emphasis omitted)). But Congress expressly defined the term "recordkeeping requirement" (44 U.S.C. 3502(17) (Supp. V 1987)), and it did not include that limitation. Thus, respondents require this Court to imply that *additional* limitation as well.[7]

Even if this additional proposed limitation were valid, the hazard communication standard's recordkeeping requirements would still qualify as information collection requests. The hazard communication standard specifically provides that an employer must make the relevant records (namely, written hazard communication programs and MSDSs) available, "upon request," to the Assistant Secretary of Labor. See 29 C.F.R. 1910.1200(e)(4) and (g)(11). Respondents apparently recognize this fact. Their solution to this problem is to suggest *yet another* implicit limitation. They argue that the "most natural meaning" of the term "record" is a document "to preserve evidence that some act or event occurred" (Br. 35 n.22). This definition, which excludes virtually all technical, scientific, financial and statistical records, appears to serve no purpose except to further respondents' immediate goal of exempting the relevant provisions of the hazard communication standard from PRA review. At bottom, respondents want this Court to rewrite the PRA to fit their theory. And as their extensive requests for redrafting show, once one begins to rewrite legislation, there is no logical stopping point.

b. Respondents have created their elaborate theory on the premise that the terms "information collection request" and "collection of information" "do[] not provide a direct answer to the question presented here" (Br. 27-28). We disagree with that premise. But as we explained in our opening brief (at 25), even if the PRA were silent or ambiguous with respect to the meaning of those terms, a court "does not simply impose its own construction on the statute" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)). Instead, a court must give deference to OMB's reasonable interpretation of the PRA. See *id.* at 843-844. In this case, OMB's regulations implementing the PRA unambiguously affirm that the relevant provisions of the hazard communication standard are subject to PRA review. See Gov't Br. 5-8, 25-31.

As we have shown, OMB's longstanding construction is consistent with the express language of the PRA, and per-

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submit it to the agency. The passages provide no basis for inferring that Congress intended that the PRA, as a whole, would apply *exclusively* to such requests. Respondents' reliance on the PRA's legislative history (Br. 25-27) is similarly flawed.

[7] Respondents mistakenly assert (Br. 29) that the PRA's legislative history supports their implication. The relevant passage, however, simply states:

> The term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified information. The definition *includes* information maintained by persons which may be but is not necessarily provided to a Federal agency.

S. Rep. No. 930, 96th Cong., 2d Sess. 40 (1980) (emphasis added). This passage is not phrased in terms of a limitation, and it says nothing about exempting records that are not prepared for the government's use and not provided to the government upon request.

haps for that reason respondents do not expressly challenge its reasonableness. See Resp. Br. 33-38. Instead, they contend that OMB's interpretation "is not entitled to any deference" (*id.* at 34) because the OMB regulations address "a subject *outside* the limits of the program Congress created in the PRA" and because "OMB is proposing an accommodation of policies that were *not* committed to the office's care by the PRA" (*id.* at 37). Respondents' argument rests on a basic misunderstanding of the *Chevron* doctrine and the PRA.

Respondents repeatedly contend (Br. 35, 36, 37, 38) that Congress has not given OMB the power to determine the scope of its own statutory authority. But that is not the issue. The question is whether OMB's expert interpretation of *provisions of a statute that it administers*—in this case, interpretation of the terms "information collection request" and "collection of information"—is entitled to deference. This Court's decisions leave no doubt that OMB's interpretations are entitled to judicial respect if they are reasonable. See, *e.g.*, *Chevron*, 467 U.S. at 843-844 (and cases cited therein). An agency's construction of the statutory provisions it is charged with administering will almost always affect the scope of its regulatory authority and responsibilities. But that is the inevitable and expected consequence of interpreting regulatory statutes.

The *Chevron* doctrine's core principle of judicial deference to reasonable administrative interpretations is no less applicable because of that consequence. Indeed, *Chevron* itself demonstrates that fact. The precise regulatory question at issue in that case was the meaning of the Clean Air Act's statutory term "stationary source." The construction of that term directly determined the scope of the Environmental Protection Agency's responsibilities and authority in regulating new and modified stationary sources in "nonattainment areas." See *Chevron*, 467 U.S.

at 839-840. The Court nevertheless gave deference to the agency's interpretation. This case, far from being "qualitatively different" (Resp. Br. 36) from *Chevron*, is not meaningfully distinguishable.[8]

The cases that respondents cite do not question that an agency's regulatory interpretation is entitled to deference even though that interpretation may affect the scope of the agency's authority. They simply state the unremarkable principles that the courts have the final word on questions of statutory construction (*e.g.*, *NLRB* v. *Insurance Agents' Int'l Union*, 361 U.S. 477, 499 (1960); *Social Security Bd.* v. *Nierotko*, 327 U.S. 358, 369 (1946)) and that unreasonable agency interpretations are not entitled to deference (*e.g.*, *Board of Governors* v. *Dimension Financial Corp.*, 474 U.S. 361 (1986)).

Respondents are also mistaken in contending that Congress specifically withheld from OMB the authority to resolve, through regulatory interpretation, ambiguous provisions of the PRA. As this Court stated in *Chevron*, " 'The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill

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[8] See also, *e.g.*, *Massachusetts* v. *Morash*, 109 S. Ct. 1668, 1673-1674 (1989) (deference to the Secretary of Labor's determination that vacation pay is not an employee benefit welfare plan, which determines the scope of the agency's regulatory responsibilities under ERISA); *K mart Corp.* v. *Cartier, Inc.*, 108 S. Ct. 1811 (1988) (deference to the Customs Service's interpretation of the Tariff Act of 1930, which determines the scope of the agency's authority to exclude "greymarket" imports); *EEOC* v. *Commercial Office Products Co.*, 108 S. Ct. 1666, 1671 (1988) (deference to the EEOC's interpretation of Title VII, which determined the agency's authority to bring a civil rights enforcement action); *NLRB* v. *United Food & Commercial Workers Union*, 108 S. Ct. 413, 421 (1987) (deference to the NLRB's interpretation of the NLRA, which determined the agency general counsel's authority to make post-complaint informal settlement decisions).

any gap left, implicitly or explicitly, by Congress.' " 467 U.S. at 843 (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974)). In this instance, Congress expressly granted OMB that power by directing the agency to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter" (44 U.S.C. 3516). Moreover, the Senate Committee Report accompanying the legislation expressly observed that OMB would have authority to interpret whether particular agency actions constituted the collection of information. That Report states:

> The "collection of information" definition does not change the scope of current authority and practice by the Director of OMB and the Comptroller General to promulgate rules and regulations needed to interpret the relationship of certain kinds of information to the definition of collection of information. This practice is presently evident in OMB Circular A-40 and GAO regulations (4 CFR Part 10). Previous editions of Circular A-40 and GAO regulations demonstrate how this authority has been used during the 37-year history of the original Federal Reports Act.

S. Rep. No. 930, 96th Cong., 2d Sess. 39 (1980); see also Gov't Br. Add. 16a-25a (setting forth the Bureau of the Budget's original Regulation A). Thus, there is no merit to respondents' contention that OMB lacks interpretative authority. And since OMB's regulatory interpretation in this case is reasonable, it is entitled to deference.

3. Respondents are also mistaken in contending (Br. 39-48) that OMB has "exceeded the explicit limits placed on the Office's authority by the PRA" (*id.* at 48). As we explained in our opening brief (at 31-37), the PRA expressly requires OMB to review information collection requests to "determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility." 44 U.S.C. 3508. See also 44 U.S.C. 3504(c). That is what OMB did in this case.

Respondents do not contend that OMB acted in excess of *that* statutory requirement. See, *e.g.*, Public Citizen Br. in Opp. 7 ("OMB's basic objection to OSHA's decision to apply the revised [hazard communication standard] to multi-employer worksites was that it 'does not appear to be the least burdensome [way] necessary for the efficient transmittal of hazard information' ").[9]

Respondents nevertheless contend that *other* provisions of the PRA implicitly limit or repeal the statute's express command that OMB "determine whether the collection of information is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508). That argument is unconvincing. This Court generally is reluctant to infer that Congress's enactment of one statute implicitly repeals another. *E.g.*, *Pittsburgh & L.E.R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2596 (1989); *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). The Court should be especially reluctant to conclude that Congress has enacted a statute that implicitly repeals or modifies its *own* text. See *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947). As we explained in our opening brief, there is no reason to reach such a strange conclusion here.

a. Respondents base their argument, first, on Section 3504(a) of the PRA, which states that "[t]he authority of [OMB] under this section shall be exercised consistent with applicable law" (44 U.S.C. 3504(a) (1982 & Supp. V 1987)). They contend (Br. 43-46) that the Occupational

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[9] Although respondents criticize OMB's actual decision in this case (Br. 46-47), they acknowledge that the only question before this Court is whether OMB has *authority* to review the hazard communication standard (*id.* at 18). See Gov't Br. I, 19 n.9. Since the court of appeals' exercise of jurisdiction in this contempt action was premised solely on that court's belief that OMB lacked authority to review the hazard communication standard (see p. 2, *supra*), the court did not examine the substance of OMB's determination.

Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, which requires the Secretary of Labor to set occupational safety and health standards, constitutes the "applicable law" in this case and that OMB review of the hazard communication standard would breach that law. Respondents' contention reflects a fundamental misunderstanding of the relationship between the PRA and other statutes.

The PRA states that OMB must review agency information collection requests to "determine whether the collection of information is *necessary for the proper performance of the functions of the agency*" (44 U.S.C. 3508 (emphasis added)). In this case, the OSH Act defines the agency's relevant functions. Section 6(b)(5) of the OSH Act requires the Secretary of Labor to set occupational safety and health standards that "most adequately assure[ ], to the extent feasible" that no employee will suffer material impairment (29 U.S.C. 655(b)(5)), and Section 6(b)(7) of the OSH Act requires that the Secretary also prescribe "the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised" of workplace hazards (29 U.S.C. 655(b)(7)). The question for OMB is whether the collection of information requirements that the Secretary of Labor has imposed in promulgating the hazard communication standard are, in fact, necessary to fulfill the OSH Act's requirements. Indeed, OMB's regulations are quite specific in limiting OMB's review in this manner. See 5 C.F.R. 1320.4(c)(1).[10]

[10] For example, OMB's regulations state that OMB will review whether an agency's information collection request is "the least burdensome necessary for the proper performance of the agency's functions *to comply with legal requirements* and achieve program objectives" (5 C.F.R. 1320.4(b)(1) (emphasis added)). See 5 C.F.R. 1320.4(c). Furthermore,

> OMB will consider necessary any collection of information *specifically mandated by statute* or court order, but will independently assess any collection of information to the extent that the agency exercises discretion in its implementation * * *.

5 C.F.R. 1320.4(c)(1) (emphasis added).

Since OMB bases its review on whether the agency's paperwork requirements are necessary for the agency to perform its statutory functions, there is no conflict between OMB review and the "applicable law." Instead, OMB review actually promotes the agency's ultimate objectives by assuring that it fulfills its statutory functions with a minumum of paperwork. There can be no conflict between OMB's review requirements and other "applicable law" unless that law requires the agency to collect information that it does *not* need to perform its functions. That situation is unlikely ever to arise. But in any event, it certainly is not the case here. Thus, OMB is not precluded by "applicable law" from conducting a PRA review of the hazard communication standard.

b. Respondents also contend that Section 3518(e) of the PRA precludes OMB from conducting its paperwork review in this case. That section simply states, however, that "[n]othing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget, or the Director thereof, * * * with respect to the substantive policies and programs of departments, agencies and offices" (44 U.S.C. 3518(e)). As we explained in our opening brief (at 33-34), this provision does not implicitly repeal OMB's obligation to "determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508); instead, it provides an explicit assurance that OMB's authority under the PRA extends only to review of information collection requests under the prescribed standard, and no further.

Respondents' argument that Section 3518(e) repeals or modifies Section 3508's express standard of review suffers from a number of serious flaws. As an initial matter, respondents have themselves acknowledged that "[e]ntirely aside from OMB's responsibilities under the PRA, OMB has *sweeping authority* under Executive Orders 12,291 and 12,498 to supervise comprehensively the development of any regulatory action that imposes a paperwork requirement" (Public Citizen Br. in Opp. 4 (emphasis added)). Indeed, Public Citizen explains at some length that—apart from the PRA—OMB extensively reviews regulatory initiatives, including those involving information collection and dissemination, throughout all phases of the rulemaking process. *Id.* at 4-7. Thus, respondents concede that there is nothing novel about OMB's exercising oversight of agency regulatory activities.

Furthermore, Section 3518(e)'s reference to an agency's "substantive policies and programs" must obtain its meaning from the context in which the substance/procedure distinction is made. See *Sun Oil Co.* v. *Wortman*, 108 S. Ct. 2117, 2124 (1988). In the case of the PRA, the substance/procedure distinction draws a line between OMB's exercise of statutory duties under the PRA—including its express authority to review information collection requests—and the exercise of other statutory or policy oversight not related to paperwork. That distinction is not "tautolog[ical]" (Resp. Br. 40); it provides "interpret[ive]" guidance (44 U.S.C. 3518(e)) in determining whether OMB has any other authority under the PRA beyond that set forth expressly in the statute.

In this case, OMB simply seeks to comply with the PRA's *express* requirement that OMB review information collection requests. Respondents' reading of Section 3518(e)—which would make OMB's review authority turn

on whether OMB needs to make "substantive policy determinations" (Br. 41 (emphasis omitted))—would result in an implicit repeal, in whole or in part, of Section 3508's express directive. Although respondents are willing to suggest how that judicial repealer should be written (*ibid.*), they are unable "to define the precise point at which 'paperwork management' becomes 'substantive decision[making]' " (*id.* at 42). Thus, the threshold question of OMB's authority to review information collection requests would henceforth be litigated separately in every case and would turn on an intractable inquiry into whether OMB will need to make "substantive" decisions. Certainly, Congress did not intend these bizarre and unproductive results.

4. Finally, respondents are noticeably silent on the practical justifications for their position. As we explain in our opening brief (at 35-37), OMB's centralized PRA review of agency initiatives, such as the hazard communication standard, promotes Congress's express objectives of minimizing the paperwork burden and maximizing the usefulness of government information collection activities. OMB's expert review not only relieves the public of unnecessary paperwork and reduces government duplications of effort, it improves agency decision-making and ultimately decreases the courts' burdens in reviewing potentially defective rules.

Respondents do not dispute that OMB's review of the hazard communication standard in this case will result in improved decision-making. OMB's review has led the Department of Labor to undertake further analysis and to solicit additional public comment. See 53 Fed. Reg. 29,822-29,856 (1988). Respondents repeatedly cite with approval (Br. 10-12, 45, 47 n.33) the Department of Labor's expanded articulation of its reasoning made in response to OMB's concerns. Indeed, even respondents are forced to acknowledge (*id.* at 11 n.8, 12 n.10) that the Department of Labor has proposed important modifications in light of OMB's concerns. Whatever its ultimate content, the revised

regulation will be a more thoroughly documented and better reasoned rule because of the PRA review process.

At bottom, respondents' only justification for prohibiting OMB from reviewing the hazard communication standard is a vague distrust of that agency. They suggest that allowing OMB to conduct the statutorily required paperwork review would result in allowing the "fox" to guard "the henhouse" (Br. 38). But that is not a legal argument.[11] Respondents' contention "runs contrary to the presumption to which administrative agencies are entitled—that they will act properly and according to law." *FCC* v. *Schreiber*, 381 U.S. 279, 296 (1965). See also *Fahey* v. *Mallonee*, 332 U.S. 245, 256 (1947). Respondents' suspicions do not provide a sufficient basis for overruling a legislative judgment.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[11] Nor is it even an apt metaphor—respondents' complaint is that OMB will be *too* vigilant in protecting the public from paperwork burdens.

* The Solicitor General is disqualified in this case.

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